accordingly there was no contract between the parties.

This might lead to some absurd conclusions and consequences but at this stage of the proceedings the court is in no position to conclude that it is clear that the first defendant is an accounting party. It seems to me that the court could eventually after trial arrive at one of three conclusions:

(1) That there was a partnership in terms as set out in exhibit TEC-1.

(2) That there was a partnership in terms as set out in paragraph 2(b) of the statement of defence.

(3) That the plaintiff was under the impression that the terms were as set out in TEC-1 and the first defendant was under the impression that the terms were as set out in paragraph 2(b) of the statement of defence.

If the court concludes that there was an agreement between the parties in the terms of (1) or (2) above, then it will be held that there was in existence a partnership between the parties and accounts will be ordered to be rendered. If, however, the finding is as *per* (3) above then the court could very well conclude that the contract of partnership was not made by the free consent of the parties in that they had not agreed upon the same thing in the same sense. As has been seen earlier, it could be envisaged that this might lead to some absurd consequences which possibility may be put forward as an argument in support of the contention that the court should not arrive at such a conclusion. Be that as it may, as I have stated earlier, the position is far from clear and as such, moving the court for a summary order under Order 43 rule 1(i) was misconceived.

The appeal is allowed with costs. The order of the Senior Assistant Registrar of November 28, 1986 is set aside.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

BINA SATU SDN. BHD. v. TAN CONSTRUCTION

[O.C.J. (V.C. George J.) July 18, 1987]

[Kuala Lumpur – Originating Summons No. D3-31-86 of 1987]

Companies and Corporations – Petition to wind up company – Injunction to restrain petition – Application for – Preliminary objection to application – Whether section 54(b) of the Specific Relief Act 1950 removes power of court to grant injunction – Section 54(b) – Explanation of.

Civil Procedure – Injunction to restrain winding-up petition – Application for – Preliminary objection to application – Whether section 54(b) of Specific Relief Act 1950 removes court's power to grant injunction – Explanation of – Specific Relief Act 1950, ss. 50, 52-55.

The plaintiff owed the defendants a certain amount of money. The defendants demanded payment and the plaintiff was unable to pay the money. The defendants petitioned the court to wind up the plaintiff claiming that the plaintiff was unable to pay its debts. The plaintiff sought an injunction to restrain the defendants from petitioning the court to wind up the plaintiff.

The defendants submitted on a preliminary point, namely, that the power to grant the injunction sought was not founded upon statute but an inherent jurisdiction which power had been excluded by statutory prohibition, namely, section 54(b) of the Specific Relief Act 1950 (Revised 1974).

Held, overruling the preliminary objection: (1) section 54(b) should be read as having reference to only perpetual injunctions. In the present case, the injunction sought was a temporary injunction;

(2) section 54(b) relates to injunctions imposed on other courts and not to injunctions imposed on the parties to the litigation. The injunction sought in the present case was to restrain the defendants and not the court.

Cases referred to:

(1) *Re A Company* [1894] 2 Ch. 349.
(2) *Cadiz Waterworks Co.* v. *Barnett* L.R. 19 Eq. 182.
(3) *Tan Suan Choo* v. *Majlis Perbandaran Pulau Pinang* [1983] 1 M.L.J. 323.
(4) *Cotton Corpn. of India* v. *United Industrial Bank* A.I.R. 1983 S.C. 1272.

COMPANIES WINDING UP.

Y. L. Tho for the plaintiffs.

G. Sri Ram (*R. Muthu* with him) for the defendants.

Cur. Adv. Vult.

V.C. George J.: An important question that arose in this matter was whether the court had the

power to restrain a party from petitioning the court to wind up a company.

Tan Construction had sent a Companies Act section 218(2) notice to Bina Satu Sdn. Bhd. (Bina) demanding the payment of a sum of $64,811.18 said to be owing from Bina to Tan Construction for work done. Tan Construction's solicitors made it clear in the notice that it was a section 218(2) notice and pointed out therein that if the amount demanded was not paid within 21 days Bina will be deemed to be unable to pay its debts and that appropriate action would be taken to have Bina wound up.

Bina thereupon took out this originating summons seeking an injunction restraining Tan Construction from instituting proceedings to wind up Bina. The originating summons was supported by the affidavit of one Hee Kon Ying who claims to be a director of Bina. Hee says that Tan Construction's claim appeared to be in respect of work done by them at a housing estate at Chaah, Johore. Hee says that the job had been contracted out by Bina to one Pann Marketing Co. Sdn. Bhd. and that if Tan Construction had completed that job it was not on the instructions of Bina. There never had been any contractual relations at all between Tan Construction and Bina and accordingly even if Tan Construction had done or completed the job, their claim for work done should be against those who had employed them and not against Bina. Hee went on to say that his company is involved in a number of on-going projects as contractors, the subject matter of which runs into millions, and at the time of affirmation of his affidavit substantial sums of money were due to Bina in respect of those contracts. Further according to Hee, Bina had substantial financial facilities granted to them by their bankers. Hee says that the reaction of the bankers to the presentation of a winding-up petition itself could ruin Bina. He contends that the harm the company would suffer before the petition is heard and disposed of would be immeasurable. Hee contended that the company was and is perfectly capable of meeting its liabilities and went on to contend that the demand for payment was misconceived and the taking of winding-up proceedings is an abuse of the process of court in that Tan Construction was aware that their claim was disputed. It was contended that the petition was being presented in order to pressurize the company into making payments (which it is not liable to pay) to avoid the drastic effects of the commencement of winding-up proceedings.

When the originating motion came up for hearing in chambers, *ex parte*, an interim interlocutory injunction was granted to obtain until further order of court and directions were given for the originating summons to be heard *inter partes* on May 26, 1987.

Before that date various other affidavits were filed.

On May 26, 1987 when the originating summons was recalled, Encik G.K. Sri Ram appeared with Encik Muthu on behalf of Tan Construction and asked for enclosure (7) which was the application to set aside the interim injunction to be heard. However, what I did was to hear the originating summons itself which is enclosure (1).

Encik Sri Ram then took up a preliminary point. His contention was that the power of the court to grant the injunction sought was not founded upon statute but on inherent jurisdiction which power had been excluded by statutory prohibition, namely, section 54(b) of the Specific Relief Act 1950 (Revised 1974).

Section 23(2) of the Courts of Judicature Act 1964 provides confirmation that the court continues to enjoy its inherent powers. This includes the power to restrain any abuse of its proceedings. A classic illustration of the abuse of court proceedings is provided in *Re A Company*[1] where it was held that where a petition against a company is presented ostensibly for a winding-up order but in reality for another purpose such as to bring pressure to bear on the company, the court has an inherent jurisdiction to prevent such an abuse of process and will do so by injunction. In *Cadiz Waterworks Co.* v. *Barnett*[2] it was for the same reason held that the creditor of a solvent company whose debt is *bona fide* disputed will be restricted from presenting a petition for winding up the company.

However, there could be no question but that by statute the inherent powers of the court may be watered down or even be excluded. The question posed by the preliminary point taken is whether section 54(b) has the effect of excluding or watering down the court's inherent jurisdiction to grant an order restraining the abuse of its process.

Section 50 of the Specific Relief Act provides statutory confirmation of the inherent jurisdiction of the court to grant preventive relief by means of injunction, temporary or perpetual. Sections 52

to 55 of the Act are found in the 10th Chapter thereof which chapter is entitled "Perpetual Injunctions". On the face of it, those four sections 52 to 55 must accordingly be read to have reference to perpetual injunctions only. Dato' Justice Edgar Joseph Jr. in *Tan Suan Choo* v. *Majlis Perbandaran, Pulau Pinang*[3] applied such a limitation to the reading of those sections. Since the relief sought in the instant case is temporary and not perpetual although there appears to be some inconsistency between the title to the 10th Chapter and the language of those four sections, I have not been able to see my way to refuse to read those sections without imposing the limitations suggested by the title to the chapter.

There is another and perhaps more forceful reason for holding that the preliminary objection has to fail. Our Specific Relief Act was inspired by the Indian Specific Relief Act of 1887 which is the predecessor to the current Indian Specific Relief Act 1963. The equipollent section to our section 54(b) was their old section 56(b) which section was *in pari materia* with our section 54(b):

"An injunction cannot be granted –

(a) ...

(b) to *stay proceedings* in a court not subordinate to that from which the injunction is sought."

When the Indians amended their Specific Relief Act in 1963, the old section 56(b) became the new section 41(b) which is as follows:

"An injunction cannot be granted –

(a) ...

(b) to *restrain any person* from instituting or prosecuting any proceedings in a court not subordinate to that from which the injunction is sought."

It seems to me that the difference between the old and the new is significant. In *Cotton Corpn. of India* v. *United Industrial Bank*[4], Mr. Justice Desai in discussing the old and new provisions said at p. 1275:

"A glance at the two provisions, the existing and the repealed, would reveal the legislative response to judicial interpretation. Under section 56(b) of the repealed Act, the court was precluded by its injunction to grant stay of proceeding in a court not subordinate to that from which the injunction was sought. In other words, the court could stay by its injunction a proceeding in a court subordinate to the court granting injunctions. The injunction granting stay of proceeding was directed to the court and the court has to be the court subordinate to the one granting the injunction. This is postulated on the well-recognized principle that the superior court can regulate proceedings in a court subordinate to it. It is implicit in this assumption and the language used in section 56(b) that the court could not grant injunction under section 56(b) of the repealed Act to stay proceeding in a court superior in hierarchy to the court from which injunction is sought. But by judicial interpretation, a consensus was reached that as injunction acts *in personam* while the court by its injunction cannot stay proceedings in a court of superior jurisdiction, it could certainly by an injunction restrain a party before it from further prosecuting the proceeding in other courts (which) may be superior or inferior in the hierarchy of courts. To some extent this approach not only effectively circumvented the provision contained in section 56 of the repealed Act but denuded it of its content. The legislature took notice of this judicial interpretation and materially altered the language of the succeeding provision enacted in section 41(b) replacing section 56(b) of the repealed Act while enacting Specific Relief Act of 1963."

For statutory encroachment into the inherent powers of the court to be effective, it must be by clear unambiguous language. It seems to me clear that both by inherent powers and by administrative rules, the High Court may interfere with proceedings of the subordinate courts but it may not stay proceedings of a court superior or even of coordinate jurisdiction to it. However, although with respect I do not agree with Mr. Justice Desai that the approach taken by the Indian courts was to circumvent the section and to denude it of its content, I am inclined to follow him and the Indian judges who have commented on this issue in holding that their old section 56(b) has reference to an injunction imposed on the other court and not in respect of an injunction imposed on the parties to the litigation or intended litigation and would apply such an interpretation to our section 54(b) which, as has been seen, is *in pari materia* with the old Indian section 56(b). The judicial pronouncements on section 41 of the Indian Specific Relief Act 1963 are of no relevance since there are no equipollent provisions in Malaysia.

The injunction sought is not to restrain the court but to restrain Tan Construction, its servants and agents from filing a petition.

Accordingly the objection taken as a preliminary point is overruled.

I will adjourn to another date to hear other arguments on the merits of the application.

Order accordingly.

Solicitors: *Y.L. Tho & Partners; Muthu & Co.*